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IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

CRIMINAL APPEAL NO. 768 **/2004**

2567/04

APPELLANT : Baliyar @ Bhokalu
IN JAIL S/o Amar Singh aged about 29 year
R/o village Khalari P.S. Keshkal
District Bastar. (C.G.)

Filed on 05/7/04
by Shri Kailash Sao Advocate

VERSUS

R to D.R. (J) 8/05/7/04

RESPONDENT The State of Chhattisgarh
Through-P.S. Keshkal.
District Bastar. (C.G.)

S.T. No. - 104/2001
Offence U/s – 302 R/w 34 & 201 of I.P.C.
Court of Ist A.S.J. bastar Jagdalpur.

CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

XI-HC-22

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आदेश पत्रक

मामला क्रमांक Cr.A. 768/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench :
Hon'ble Shri Justice L.C. Bhadoo, J &
Hon'ble Shri Justice V.K Shrivastava, J.

28/11/2005

Shri Yogesh Pandey, counsel for the appellant.

Shri U.N.S. Deo, Additional Public Prosecutor for the State.

Learned counsel for the parties submit that the appeal of co-accused Naduram has already been decided by this Court vide judgment dated 09/05/2003, therefore, this appeal may also be finally heard and disposed of.

Considering the above submissions we have heard learned counsel for the parties.

ORAL JUDGMENT

By this appeal the accused/appellant Baliyar @ Bhokalu has questioned the legality of conviction and sentence passed by learned First Additional Sessions Judge, Bastar at Jagdalpur in Sessions Trial No. 104 of 2001 by which the learned First Additional Sessions Judge after holding the accused/appellant along with Naduram guilty of the offence under Section 302 read with Section 34 and Section 201 of the Indian Penal Code, convicted each of them under the said Sections and sentenced them to undergo imprisonment for life and to pay fine of Rs.500/- each in default of payment of fine to further undergo

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rigorous imprisonment for six months and to undergo rigorous imprisonment for two years and to pay fine of Rs.200/- each, in default of payment of fine to further undergo rigorous imprisonment for three months respectively. Both the sentences were directed to run concurrently

2) The prosecution case, in brief, is that on 12/12/2000 Kawaluram, father of deceased went to Police Chowki, Vishrampur along with Sarpanch Ramlal, Bhanwar Singh and Mainuram and gave merg intimation (Ex.P/1) to the Incharge, Police Chowki with the allegation that his son Neeru was working with Bhanwar Singh and he used to drive his tractor. Yesterday night at about 7 to 8 p.m., after taking dinner he left the house along with Nadu Gond and today morning at about 6 -7 a.m., Amar Singh informed him that outside his small garden the body of his son Neeru is hanging on a tamarind tree. The body is touching the ground. On receiving this information, the Incharge of Police Chowki, Vishrampuri, K.K. Mishra reached the site and saw that a rope was tied around the neck of deceased Neeru and the body was hanging by the rope. There was a plastic container tied with the waist of the deceased. Two shawls and one T-shirt were also lying at the site. It appeared that the shawls and the T-shirt are of accused - Nadu. He had a doubt that Neeru had been murdered. Based on this report, the Chowki Incharge went to the site. After giving notice (Ex. P/3), he prepared Panchnama of the dead body

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(Ex.P/2) and also prepared Panchnama of the spot (Ex.P/4). One Sando Baniyan and a black full pant were taken into possession from accused Naduram vide Ex.P/5. Accused Naduram was arrested vide Ex.P/7. The dead body of Neeru was sent for post mortem and in turn post mortem was conducted by Dr. G.R. Dhaneliya. The post mortem report is Ex.P/8. The Chowki Incharge-sent a Merg intimation vide Ex.P/9. Based on that the first information report (Ex.P/10 & P/11) was registered. The crime details were recorded in crime details form vide Ex.P/14. One shawl and one T-shirt were taken into possession from the site vide Ex.P/15. The plastic container and the rope were taken into possession. A ten rupee note was also taken into possession from Sahodara Bai vide Ex.P/17 and after completition of the investigation, charge-sheet was filed against the accused persons.

3) Learned Additional Sessions Judge after perusing the records, framed the charges against the accused persons for the offences under Sections 302 and 201 of the Indian Penal Code. The accused persons denied the charges.

4) The prosecution in order to prove the offence against the accused persons examined in all seven witnesses at the trial. The statements of the accused persons persons were recorded under Section 313 of the Code of Criminal Procedure. They

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pleaded ignorance and said that they are innocent and have been falsely implicated in this case.

5) The learned Additional Sessions Judge after hearing the arguments of learned Additional Public Prosecutor and the learned counsel for the accused persons passed the impugned judgment.

6) We have heard learned counsel for the accused/appellant and the Additional Public Prosecutor for the State, perused the judgment of the trial Court and the evidence available on record.

7) Learned counsel for the accused/appellant has argued that there is no evidence in this case. The prosecution has relied upon the theory of last seen. There is no oher evidence which goes to show that the accused and the deceased were at any point of time having strained relation and the last seen evidence is a very weak type of evidence and without corroboration by any other circumstantial evidence looking to the present facts and circumstances of the case, the accused cannot be held guilty only on the basis of that evidence. She has further argued that the appeal of the co-accused has already been decided by this Court.

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8) On the other hand, learned Additional Public Prosecutor for the respondent/State supported the judgment of the trial Court.

9) The fact of the homicidal nature of the death of Neeru has not been disputed by the counsel for the accused/appellant. Apart from that, the evidence of PW/6- Dr.G.R. Dhaneliya is to the effect that the injury was ante mortem in nature and there was ligature mark around the neck and clotted blood was pesent. The mark of the rope on the neck of the deceased was 2.5 cm in width. The face was in swollen condition. The tongue was beween the teeth. He has opined that the cause of death of the deceased was asphyxia due to strangulation by rope. Therefore, in view of the statement of the doctor, it is established that the nature of the death of the deceased was homicidal.

10) As far as the involvement of the accused/appellant in the crime in question is concerned, there is no direct evidence to connect the accused with the crime. The whole case of the prosecution rests on the circumstantial evidence i.e., last seen theory and in order to prove the offence against the accused/appellant based on circumstantial evidence, the prosecution has to prove the crime against the accused/appellant as per the settled principle laid down by the Hon'ble Apex Court i.e., in a case based on circumstantial evidence before the Court

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can record conviction, it must satisfy itself that circumstances from which an inference of guilt could be drawn have been established by unimpeachable evidence led by the prosecution and that all the circumstances put together are not only of a conclusive nature but also complete the chain so fully as to unerringly point only to the guilt of the accused and are not capable of any explanation which is not consistent with the hyphothesis of the guilt of the accused.

11) So far as the question of connecting the accused with the crime on the basis of last seen theory is concerned, Hon'ble the Apex in the matter of ***Bodhraj alias Bodha and others Vs. State of Jammu and Kashmir, reported in (2002) 8 SCC 45*** has held that the circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. For a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who

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had seen its commission. The offence can be proved by circumstantial evidence also. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the accused was found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to conclude guilt in those cases.

12) In the matter of ***Subhash Chand Vs. State of Rajasthan, reported in (2002) 1 SCC 702,*** Hon'ble the Apex Court has held that to constitute the evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a

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point of time in close proximity with the time and date of the commission of crime.

13) Based on the above principle, if we examine the evidence in the present case, PW/3 – Jugbati, mother of the deceased has deposed that her son had died about six months prior to recording of her evidence. In the night at about 8.00 p.m. accused Naduram and Baliyar came to her residence and called Neeru and thereafter they took him along with them. Next morning her son was found in hanging position. In the cross examination she has stated that the accused persons and her son Neeru were friends. There was no strained relation or quarrel took place between them. Since 2 – 4 years the accused persons were friends of her son. At the time when the accused persons called her son she was in the house. On earlier occasions they used to call my son and take him alog with them.

14) PW/4 Sulochana, niece of deceased Neeru, has stated that on the fateful day she was going to watch TV and when she

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was returning after watching TV she saw the accused persons and deceased Neeru at the residence of Mainu consuming liquor. Thereafter she saw Neeru in a dead condition. She further stated that she did not see Neeru and the accused persons quarreling. In the cross examination she has staed that she had not seen them consuming the liquor but she saw the accused persons and the deceased entering into the house of Mainu.

15) PW/5 - Mainu has stated that on the fateful night all the three persons namely the accused and the deceased came to his house, consumed liquor and thereafter they took one bottle of liquor for Rs.10/- and left his house. Because all the three persons insisted him, therefore, he also consumed the liquor. In the cross examination he has stated that the deceased Neeru and accused Naduram came to his house. Naduram took the wine and the money was also given by him. Both Naduram and Neeru were in a heavily drunken condition and were not in a position to walk properly.

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16) On the fair scrutiny of the evidence, the only evidence is that the deceased left his house along with the accused persons and thereafter Sulochana saw all the three persons entering into the house of Mainu and Mainu has stated that accused Naduram and deceased Neeru were in a heavily drunken condition and he has further stated that in cross examination so far as present appellant is concerned, he had not come with Naduram and Neeru. There is no evidence which goes to show that during this period the deceased and the accused were noticed quarreling. Mainu has stated that both the deceased – Neeru and accused – Naduram were in a heavily drunken condition. The mother of the deceased has stated that the accused and the deceased were friends and she never noticed any strained relation between them nor saw them quarreling. In the charge-sheet it has been mentioned that the deceased and the accused used to bring call-girls and during the drunken condition some dispute took place between them and thereafter the accused persons murdered Neeru by the nylon rope. To this effect, the prosecution has not adduced any evidence that how the Investigating Officer came to this conclusion and if it was

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so then why any evidence regarding that they called the call-girls has not been adduced without which no inference can be drawn.

17) In view of the above evidence of Mainu (PW/5), the present accused/appellant had not come with Neeru and Naduram at his residence, therefore, the theory of last seen together has not been established. The relations of the accused/appellant with Neeru were not strained and he was seen along with Naduram in the evening by the mother of the deceased and thereafter the present accused/appellant was not seen in the company of Neeru. As per evidence of Mainu (PW/5), Mainu has stated that Neeru and Naduram were in a heavily drunken condition and there is no other material on record through which inference can be drawn that there was an occasion to the pesent accused/appellant to involve himself in committing the murder of Neeru. There is also no evidence to the effect that there is no possibility of third person coming in contact with the deceased Neeru between the time when he was last seen with the accused/appellant at 8.00 p.m and when his dead body was found in the morning in hanging condition on a

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tamarind tree. The prosecution has not been able to establish and prove the offendce against the accused/appellant merely based on the one circumstance and as per the established principle the prosecution has not been able to complete the chain of circumstances which persuades the Court to take a view that the accused is the only person responsible for the murder of the deceased and through the last seen theory in the facts and circumstances of the case no conclusive inference can be drawn that the accused is the only person who committed the murder of the deceased and in all probabilities there is no possibility that either the deceased himself committd suicide or anybody else has committed the murder. The accused/appellant in his statement has simply pleaded ignorance about the death of the deceased and he has not explained that when they departed from each other. But from the evidence of Mainu (PW/5), it has come on record that the present accused/appellant was not with Naduram and Neeru and they came to his house.

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18) In view of the above discussion, we are of the considered opinion that in the present case the prosecution has not been able to prove the offence against the accused/appellant beyond reasonable doubt, therefore, the finding of the learned trial Court based on circumstance of last seen, looking to the facts and circumstances of the case, cannot be sustained as the case is not based on legal evidence.

19) In the result, the appeal of the accused/appellant is allowed. The judgment of the trial Court convicting the accused/appellant for the offences under Sections 302 and 201 of the I.P.C., is set aside. The accused/appellant is acquitted of the charges. The accused/appellant be set at liberty forthwith, if not required in any other case.

20) In view of the above, M.Cr.P.No.95/2005 and I.A.No. 3773/2004 stand disposed of.

Sd/-
L.C.BHADOO
Judge

Sd/-
V.K.Shrivastava
Judge
28/11/2005

Raju

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